STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
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September 17, 1999

Mr. John G. Sulpizio
Port Director
Port of Sacramento
P.O. Box 980070
West Sacramento CA 95798-0070

Re: *Public Works Case No. 99-020*
*Port of Sacramento/Seaway Business Park Project*

Dear Mr. Sulpizio:

This letter constitutes the determination of the Director of the Department of Industrial Relations regarding coverage of the above-named project under the public works laws and is made pursuant to 8 California Code of Regulations (CCR) section 16000(a). Based upon my review of the documents submitted and the applicable laws and regulations pertaining to public works, it is my determination that this is a "public work" within the meaning of Labor Code sections 1720(a) and 1771.

The Sacramento-Yolo Port District ("Port") is a river port district organized under part 6 of division 8 of the Harbors and Navigation Code. The Port wishes to initiate development of certain real property it owns in order to generate income from private tenants. The proposed project, called the Seaway Business Park, is located in West Sacramento[1]. It will consist of four commercial/industrial buildings that will be leased to private parties for private commercial, warehouse and related port and maritime uses. Built on approximately 55 acres, the structures will provide approximately 1,000,000 square feet of commercial space.

The Port plans to finance the project through a nonprofit public benefit corporation ("Nonprofit") to be created pursuant to the Nonprofit Public Benefit Corporations Law (Corporations Code sections 5100 et seq.). The Nonprofit will be created by the Port specifically for this project, and all or a majority of members of its board of directors will be Port

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[1] The project will also involve construction of certain infrastructure improvements that ultimately will be dedicated to the City of West Sacramento. The Port acknowledges that the construction workers for this part of the project must be paid prevailing wages.

commissioners, officers or employees. The Port will execute a ground lease of the property in favor of the Nonprofit.

The Nonprofit will issue tax-exempt Private Activity Bonds for and on behalf of the Port. These bonds will fund construction of the project, but will not be backed by the Port's full faith and credit or its general revenue sources. Additionally, a private developer ("Developer") will secure a letter of credit from a financial institution.

The Developer will execute a construction contract with the Nonprofit to build the project. The Developer will maintain ultimate control and supervision over construction of the project. Upon completion of construction, the Nonprofit will execute a lease to the Developer. The Developer will be responsible for securing tenants, and will manage the facility.

Rental revenues from the project will be used to first extinguish all obligations arising from the Private Activity Bonds. After the bonds are retired, the net rental income will be allocated between the Developer and the Port in accordance with the provisions of the lease and financing documents.

The Port, as landlord, will ultimately own the finished facilities, while the Developer will have a leasehold interest in the facilities.

Labor Code section 1720(a)[2] defines "public works" in pertinent part as: "Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds . . . ." Without question the project described above would entail construction done under contract.[3] Thus, the fundamental question posed by these facts is whether the construction would be paid for out of public funds. If the construction were paid for out of proceeds from bonds issued by the Port itself, this would constitute payment out of public funds.[4]

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[2] Subsequent statutory references are to the Labor Code unless otherwise indicated.

[3] A project may be subject to statutory prevailing wage requirements even though the construction is done under contract awarded by a private corporation, rather than a public agency. (*See Lusardi Construction Company v. Aubry* (1992) 1 Cal.4th 976, 4 Cal.Rptr. 837.)

[4] Precedential Public Works Coverage Determination, Sierra del Oro Water Treatment Plant Project, August 10, 1989.

Here, however, the bonds would not be issued by the Port itself, but rather by a nonprofit corporation established by the Port to finance the project. The question of whether the bond proceeds are public funds for purposes of the prevailing wage law therefore turns on whether the Nonprofit is an independent third party or a mere alter ego of the Port. Under the legal doctrine of alter ego, the "corporate veil" is pierced in a variety of factual situations when the interests of justice require that the shareholders be held liable for acts done in the name of the corporation. As the California Supreme Court explained in *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300, 301, 216 Cal.Rptr. 443:

> There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792,796 . . .) And "only a difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an individual." (*McLoughlin v. L. Bloom Sons Co., Inc.* (1962) 206 Cal.App.2d 848, 851, 24 Cal.Rptr. 311.)[5]
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> The essence of the alter ego doctrine is that justice be done. "What the formula comes down to, once shorn of verbiage about control, instrumentality, agency, and corporate entity, is that liability is imposed to reach an equitable result." [Citation omitted.] Thus the corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require.

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[5] The corporate entity is disregarded when "it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation." (*McLoughlin, supra*, 206 Cal.App.2d at 851-852.)

One of these "narrowly defined circumstances" occurs where strict application of the concept of separate corporate personality would render a statute inapplicable, thus frustrating the legislative purpose. (*Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1768, 25 Cal.Rptr.2d 703.) "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985, 4 Cal.Rptr.2d 837. This purpose would be defeated if, as a consequence of setting up a corporation as a conduit for funding a project, public entities and contractors would avoid coverage of the law. Accordingly, under certain circumstances such a corporation must be viewed as the alter ego of the public entity.

While there is no litmus test to determine when the alter ego doctrine will apply, several factors that the courts have applied in disregarding the corporate entity are particularly relevant to the public works context:

1) The public entity controls the directors or officers of the third party corporation so that the public entity's decisions are those of the third party;[6]
2) The disregard of corporate formalities;[7]
3) The only asset held by the third party has been transferred from the public entity, such as a lease;[8]
4) The third party uses the public entity's facilities and employees;[9]
5) The third party corporation engages in no independent business;[10]

In this case, a number of the above factors are present. As discussed above, most if not all of the Nonprofit's directors will be Port commissioners, officers or employees. The

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[6] In *McLoughlin, supra*, two corporations were one for collective bargaining agreement purposes because directors and officers of both were essentially the same and records and books maintained by same personnel in same office. *See Say & Say, Inc.*, in which all conduct of the corporate employees was subject to the individual owner's personal supervision.

[7] *Say v. Say, supra* at 711.

[8] *O'Donnell v. Weintraub* (1968) 260 C.A.2d 352, 67 C.R. 274.

[9] *Marr v. Postal Union Life Ins. Co.* (1940) 40 C.A.2d 673, 105 P.2d 649, factors held to establish that new corporation was alter ego of parent included: (a) the new corporation engaged in practically no independent business; (b) all of its work was done by employees of the parent and the same attorney was employed by both; (c) both corporations used common offices, and (d) the parent owned the building and furniture.

[10] *Marr v. Postal Union Life Ins. Co., supra.*

Nonprofit will not have any assets other than the land lease. It will have no offices or staff of its own, but instead will use the Port's facilities and staff. Additionally, the Nonprofit will not engage in any independent business, but rather its only function will be as a vehicle for the financing of this project (and possibly one or more similar projects in the future).

Under these circumstances, the Nonprofit must be deemed the alter ego of the Port for purposes of this project.[11] Accordingly, the proceeds of the bonds to be sold by the Nonprofit constitute "public funds" within the meaning of section 1720(a). Consistent with the court decisions and precedential public works coverage determination cited herein, this project is a "public work" subject to the Labor Code's prevailing wage requirements.

Sincerely

Stephen J. Smith
Director

cc: Daniel M. Curtin, Chief Deputy Director and Acting Chief, DLSR
Marcy Vacura Saunders, Labor Commissioner
Henry P. Nunn, Chief, DAS
Vanessa L. Holton, Assistant Chief Counsel

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[11] The fact that the corporate entity has been disregarded for this purpose does not mean that it is being disregarded for any other purpose *Grant v. Weatherholt* (1954) 123 C.A.2d 34, 266 P.2d 185.